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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 391

R. S. DASS BADHWAR and R. B. LACHHMANDASS MOHANLAL & SONS, LTD., composing the co-partnership doing business under the firm name and style of MULKRAJ BROTHERS and BADHWAR,

Plaintiffs-Petitioners,

against

THE COLORADO FUEL AND IRON CORPORATION,

Defendant-Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Petitioners' statement of the case (Petition, pp. 5-12) is inadequate and misleading. It ignores significant facts and explicit findings of the District Court, which the Court of Appeals unqualifiedly accepted (Petition, p. 25), and does not accurately state the issue tendered and decided below. A brief statement of the facts involved is, therefore, necessary to a proper determination of the petition.

Statement of the Case

A. Nature of the Action

This action was brought by plaintiff-petitioners (hereinafter called "plaintiffs") for the recovery of damages for breach of a c.i.f. contract of sale by reason of the alleged

improper and delayed shipment to them at Bombay, India, of some 1,490 tons of caustic soda (Isb. Appx. 3a-13a).[1] Joined as defendants were the respondent, The Colorado Fuel and Iron Corporation (hereinafter called "Colorado"), the seller of the caustic soda; Isbrandtsen Company, Inc. (hereinafter called "Isbrandtsen"), the ocean carrier engaged by Colorado to transport the cargo from New Orleans, Louisiana, to Bombay; and American-Hawaiian Steamship Company (hereinafter called "American-Hawaiian"), the owner of the vessel, to wit, the *S. S. Hawaiian*, which Isbrandtsen chartered for the voyage and upon which the caustic soda was loaded and shipped.

The gravamen of plaintiffs' claim against Colorado was that Colorado breached its contract with them by wrongfully and improperly causing or permitting the caustic soda to be loaded aboard the *S. S. Hawaiian* at the Port of New Orleans at a time when it knew, or should have known, that said vessel was about to become immobilized by a strike of its unionized crew, as it thereafter did, and could not reasonably be expected to depart in the ordinary and usual time and manner (Isb. Appx. 3a-12a).

B. The Issue Involved

On the trial, it was stipulated that the contract of sale sued upon by plaintiffs was made in the State of New York and should be construed in accordance with the law of New York (Isb. Appx. 47a-48a).

Accordingly, as between plaintiffs and Colorado, the sole issue was whether, on the facts and as a matter of local New York law, Colorado had performed or breached its contract with plaintiffs.

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[1] Figures in parentheses, unless as in this instance otherwise indicated, refer to pages of the appendix to respondent's brief in the United States Court of Appeals.

C. Facts

Early in August, 1948, Colorado agreed to sell plaintiffs 2,000 tons of caustic soda at a price of 9½ cents per pound, c.i.f. Bombay, India, payable by irrevocable letter of credit in favor of Colorado, with shipment to be made from a Gulf port in one or more lots on or before September 22, 1948 (31a-32a, 37a; Pls.' Appx. 5a-8a).

Thereafter, on August 19, 1948, plaintiffs caused an irrevocable letter of credit to be opened by The National City Bank of New York for $239,000 and, on August 26, 1948, plaintiff, Badhwar, caused a further irrevocable letter of credit to be opened by said bank for $186,000 (32a-33a, 39a-42a). Under the first of these credits (which was subsequently amended on August 25, 1948, so as correctly to designate Colorado as the beneficiary thereof [33a; Pls.' Appx. 43a, 46a]) payment was to be made against on board bills of lading, dated at the latest October 10, 1948, evidencing the shipment of 1,000 tons of caustic soda (39a-40a), and by the second of the credits payment was to be made against like bills of lading, dated at the latest September 22, 1948, evideneing the shipment of the balance of the caustic soda (41a-42a). The District Court found (Pls.' Appx. 9a), as did the Court of Appeals by its acceptance of such finding (Petition, p. 25), that the first of the two credits effected a modification of the contract to the extent of permitting shipment of part of the caustic soda, *i.e.*, 1,000 tons, to be made as late as October 10, 1948, rather than on or before September 22, 1948, as initially specified.

When the contract was made, Colorado had a contract of affreightment with Isbrandtsen dated July 29, 1948, for the transportation of 1,000 tons of caustic soda from New Orleans to Bombay on the *S. S. Jane G. Swisshelm*, or other A-1 vessel, the scheduled sailing date of which was August 28-30, with shipside delivery required between

August 19-25, 1948 (Pls.' Appx. 11a-12a).[2] This contract had been procured by Colorado through its local New Orleans freight forwarder, Farrell Shipping Company (hereinafter called "Farrell"), and admittedly had to be obtained well in advance of shipment both because of the large size and bulk of the cargo (12a-14a) and because of the difficulty in booking space for caustic soda due to the reluctance of shipping companies to handle a material possessing its undesirable physical characteristics (Pls.' Appx. 12a).

Under the right reserved to it by its contract, and because the *S. S. Jane G. Swisshelm* would not be available for the voyage, Isbrandtsen, on August 17, 1948, substituted in lieu thereof the *S. S. Hawaiian*, concededly an A-1 vessel, with latest shipside delivery at New Orleans by September 2, 1948 (19a; Pls.' Appx. 12a). When advised of this substitution and the added time for shipside delivery, Colorado arranged to have the tonnage increased from 1,000 to 1,500 tons (Pls.' Appx. 12a-13a).

Thereafter, between August 20 and 27, 1948, Colorado shipped some 1,490 tons of caustic soda from its plant at Ladora, Colorado, to New Orleans (28a, 47a; Pls.' Appx. 13a), where it was delivered into Isbrandtsen's custody (Isb. Appx. 117a-127a; Pls.' Appx. 13a). Meanwhile, the *Hawaiian* arrived at New Orleans, where it docked on August 31st (Pls.' Appx. 13a). Loading of the caustic soda aboard the vessel was thereafter begun, continued on September 1st and completed by 6 P. M. on September 2nd (Pls.' Appx. 13a-15a).

At 3:15 A. M. on September 3rd the *Hawaiian's* stewards left the ship and went on strike (Pls.' Appx. 15a). However, loading of other cargo continued throughout the remainder of the night and until 10 o'clock in the morn-

[2] It is to be noted that no credit arrangements were made by plaintiffs prior to August 19th and that they were not completed until August 26, one day after the last date fixed for shipside delivery.

ing, at which time the engine room crew struck the vessel, with the result that it was thereafter impossible either to load any further cargo or to remove the cargo of caustic soda that already had been loaded and place it aboard another vessel (Pls.' Appx. 16a, 19a-20a).

At 9:30 A. M. on September 3rd, Farrell, then having no notice or knowledge of the work stoppage of the *Hawaiian's* stewards, delivered Colorado's check for $32,848.72 to Isbrandtsen's shipping agent in payment of the ocean freight charges and at the same time received two on board bills of lading which were on the same day, a Friday, mailed by it to Colorado (26a, 48a-49a; Pls.' Appx. 17a). On Tuesday, September 7th (the intervening Monday being Labor Day [26a]), Colorado presented sight drafts, together with the bills of lading and other documents required by the letters of credit, to The National City Bank of New York which were thereafter paid by said bank (33a-36a, 39a-42a).

The strike which immobilized the *Hawaiian* was an unusually prolonged one—lasting until December 7, 1948 (Isb. Appx. 87a-88a)—and was unexpected insofar as Farrell and Colorado were concerned. Although a threatened maritime strike on the East, Gulf and West Coasts had been enjoined in June, 1948, by two 80-day Taft-Hartley Act (29 U.S.C. §§ 1'1, *et seq.*) injunctions expiring at midnight September 2, 1948 (Pls.' Appx. 10a), the newspapers thereafter reported that collective bargaining negotiations were in progress between the affected unions and ship operators (Pls.' Appx. 10a). As a result, those connected with the maritime industry were optimistic that the disputes would be settled before the expiration of the 80-day period (Pls.' Appx. 10a-11a). The same optimism was shared by New York and New Orleans freight forwarders who, as the courts below both found (Pls.' Appx. 11a; Petition, p. 25), continued to do business as usual and to book freight for July, August and Septem-

ber sailings. Later, on August 18, 1949, this optimism was vindicated by the announcement in the press, including the New Orleans newspapers, that the threatened strike on the East and Gulf Coasts had been settled (64a; Pls.' Appx. 83a).

Despite the settlement the East and Gulf Coast labor disputes, the *Hawaiian* was struck some two weeks later at the Port of New Orleans. This happened as the result of the circumstance that the *Hawaiian* had been time chartered by Isbrandtsen from American-Hawaiian, a West Coast line, and was accordingly manned by a West Coast crew, the members of which belonged to various West Coast maritime unions which theretofore had failed to settle their differences with ship operators (Am. Haw. Appx. 35a-38a; Isb. Appx. 86a-87a, 91a; Pls.' Appx. 90a-91a). Only one other vessel in the Port of New Orleans was similarly affected (Pls.' Appx. 19a).

Prior to the strike, Farrell's officer, Becker, who handled the booking arrangement for Colorado (20a-20b), did not know that the *S. S. Hawaiian* was owned by American-Hawaiian (25a; Pls.' Appx. 13a, 17a). He testified that this was a matter which was of no concern to him since his business dealings were with Isbrandtsen who he considered to be a reliable company (25a-26a; Pls.' Appx. 13a). He further testified that while he had been told at the time of the making of the affreightment contract that the *Swisshelm* was under bareboat charter to Isbrandtsen, he was not informed of the type of charter covering the *Hawaiian* and that he made no inquiry with respect thereto as it was neither the custom nor the practice in the Port of New Orleans to do so (22a; Pls.' Appx. 13a, 61a). Conlon, a New York freight forwarder called as a witness by plaintiffs, corroborated Becker's testimony that it was not customary to inquire as to the type of charter made between ship operators and testified that he never made any such inquiry (10a, 16a).

Since Becker did not know that the *Hawaiian* was under time charter to Isbrandtsen or that American-Hawaiian was the owner thereof, he did not know, prior to the strike, that the vessel was manned by a West Coast crew or to what unions the officers and crew belonged (22a, 23a; Pls.' Appx. 13a, 17a). Prior to September 7th, Colorado also knew nothing about the crew or charter of the *Hawaiian* (28a, 29a, 55a-55b; Pls.' Appx. 13a, 18a).

Becker first learned of the strike in the early afternoon of September 3rd (22a, 26a; Isb. Appx. 56a; Pls.' Appx. 17a). However, he did not inform Colorado of it until September 7th for the reason that on September 3rd the situation was unclear and, with the long Labor Day week-end intervening, it was not until the 7th that he was able to ascertain that the strike was definitely on (26a, 61a).

Colorado was first apprised of the strike when its Denver Traffic Manager received Becker's telegram of September 7th (Pls.' Appx. 18a). Colorado wrote Farrell for an explanation and, upon being advised as to the cause of the strike, notified its New York export office accordingly (56a-57a) which, on September 20th, informed plaintiffs of the facts (Pls.' Appx. 18a). In reply, plaintiffs wrote Colorado on September 27th asking to be informed "when the strike is called off and the steamer sets sail" (Pls.' Appx. 43a, 47a).

On October 9, 1948, for reasons unrelated to the strike, plaintiffs cancelled the balance of the contract covering the unshipped tonnage (Pls.' Appx. 9a, 43a, 48a). Three months later, they for the first time complained of the delay (Pls.' Appx. 18a, 44a, 48a-49a).

D. The Decisions Below

The District Court, applying local New York law, held that due and proper shipment was made by Colorado when the caustic soda was loaded aboard the *Hawaiian* and that

since the contract between the parties was one for the sale of goods c.i.f. Bombay, all risk of delay was thereafter upon plaintiffs (Pls.' Appx. 20a-22a). The District Court further held that, even apart from the c.i.f. feature of the contract, any loss occasioned by the delay should be borne by plaintiffs since Colorado and Farrell both had acted in good faith and exercised reasonable business prudence and since Colorado, at the time the caustic soda was loaded, had no reason to believe that the vessel would not sail before the stipulated shipping dates (Pls.' Appx. 24a-25a). Judgment was accordingly entered dismissing the complaint on the merits as to Colorado (Pls.' Appx. 3a).

On appeal, the Court of Appeals, Judge Learned Hand dissenting, affirmed. The majority, in an opinion written by Chief Judge Clark, stated the issue before the court and the decision reached as follows (Petition, p. 25):

> "* * * the chief question on appeal is whether Colorado breached its contract. The district court found no breach. We agree with its conclusion and accept its findings of fact."

Having made this pronouncement, which was dispositive of the appeal, and having also thereby accepted the finding, implicit in the District Court's decision, that prior to September 3, 1948 neither Farrell nor Colorado knew, or could reasonably be expected to have known, that the *Hawaiian* would become strikebound, the majority went on to note that, even if it were assumed that Colorado was chargeable with such knowledge, it could not be charged with knowledge that the vessel would not sail by at least the latter of the two dates specified for shipment and that it could reasonably and in good faith have anticipated the contrary (Petition, pp. 27-28). The majority further noted that plaintiffs were entitled to no redress under the Federal (Pomerene) Bill of Lading Act (49 U.S.C. § 114 (c) [Petition, pp. 35-36]) by reason of the presentation by Colorado

on September 7th of the two bills of lading, first, because there was no proof that the worth of the bills of lading had been impaired by the strike, and, secondly, because Colorado at the time had no actual knowledge of the strike and could not be imputed with Becker's prior knowledge thereof as the evidence showed that his duty as Colorado's freight forwarder ended with the delivery of the bills of lading to Colorado on September 3rd (Petition, pp. 26, 29-30).

Judge Hand based his dissent on the proposition, contradicted by the evidence, that Colorado was "fully" charged with notice that the *Hawaiian* was from the West Coast and that the "strike" on that coast had not been settled and, from this premise, concluded that Colorado assumed the risk that the vessel might not sail before the date fixed for shipment (Petition, pp. 30-31). As already noted, both the District Court and the majority of the Court of Appeals found the fact to be otherwise and agreed that Colorado neither knew nor was charged with notice that the *Hawaiian* was owned by a West Coast line or manned by a West Coast crew.

POINT I

As between plaintiffs and Colorado, the one dispositive issue was whether, as a matter of local New York law, Colorado had breached its contract. The courts below both correctly decided, in conformity with applicable and well established New York law, that there was no breach.

Plaintiffs deal with this action as though it were immaterial that their contract with Colorado was for the sale of the caustic soda, c.i.f. Bombay. However, the fact is that the c.i.f. feature of the contract is of the utmost importance and required that the rights and obligations of the parties be determined by the well established rules of New York law applicable to c.i.f. contracts.

In *Seaver* v. *Lindsay Light Co.*, 233 N. Y. 273, the New York Court of Appeals stated (p. 276):

> "The meaning of the letters c.i.f. in an executory contract is, and at the time the contract in question was made were, well understood in the commercial world. They mean the cost of the merchandise, insurance thereon, and freight charges to point of destination. (*Thames & Mersey Ins. Co., Ltd.*, v. *U. S.*, 237 U. S. 19.) Unless there is something in a c.i.f. contract to indicate to the contrary, the seller completes his contract when he delivers the merchandise called for to the shipper, pays the freight thereon to point of destination, and forwards to the buyer bill of lading, invoice, insurance policy and receipt showing payment of freight."

Similarly, in *Smith Co., Ltd.* v. *Moscahlade*, 193 App. Div. 126, the New York Appellate Division, First Department, said (p. 129):

> "Under such contracts [c.i.f.] the seller fulfills all of his obligations by putting the cargo on board and forwarding to the purchaser a bill of lading and a policy of insurance of the kind then current and customarily issued in the trade, and if the goods had not been paid for in advance it was customary to present a draft for the purchase price accompanied by the bill of lading and policy of insurance and a credit slip for the insurance and freight if not actually paid for by the shipper, which documents were to be delivered to the purchaser on his paying the draft, and the insurance is for the protection of the purchaser, *who assumes all risks after the goods have been placed on board;* and this constitutes a delivery by the seller under such a contract and title thereupon passes to the buyer even though it be stated in the contract that delivery was to be made at the point of destination." (Italics ours.)

Likewise, in *Warner Bros. & Co.* v. *Israel*, 101 F. 2d 59, the United States Court of Appeals, Second Circuit, in stating the law of New York on this subject, said (p. 60):

> "Under a c.i.f. contract the seller receives a purchase price payable as the parties agree and for that consideration is bound to arrange for the carriage of the goods to their agreed destination, for insurance upon them for the benefit of the buyer, and either to pay the cost of the carriage and insurance or allow it on the purchase price. *When this has been done the seller has fully performed and is entitled to be paid upon delivery of the documents to the seller regardless of whether the goods themselves have arrived at their destination or ever will.*" (Italics ours.)

See also to the same effect:

Mee v. *McNider*, 109 N. Y. 500;
Dwane v. *Weil*, 199 App. Div. 719, 730-1 (1st Dept.), affd. 235 N. Y. 527;
Matter of Bullard, 210 App. Div. 476 (1st Dept.), affd. 240 N. Y. 388;
A. Klipstein & Co. v. *Dilsizian*, 273 Fed. 473 (C. A. 2d), cert. den. 257 U. S. 639;
Harper v. *Hochstim*, 278 Fed. 102 (C. A. 2d);
Madeirense do Brasil S/A v. *Stulman-Emrick Lumber Co.*, 147 F. 2d 399, 402 (C. A. 2d), cert. den. 325 U. S. 861.

The uncontroverted evidence here is that Colorado caused 1,490 tons of the caustic soda to be loaded aboard the *Hawaiian* prior to 6 P. M. on September 2, 1948, that on September 3rd, after payment of the ocean freight and prior to the strike of the engine room crew of the *Hawaiian*, it procured Isbrandtsen's two on board bills of lading covering the shipment, and that on September 7th it presented the bills of lading, together with its invoices

and appropriate certificates of marine insurance, to the bank designated by plaintiffs for that purpose. Accordingly, under the principles enunciated in the foregoing authorities Colorado did all it was required to do to perform its contract with plaintiffs, timely shipment was made on September 2nd, and any subsequent delay in transit was, as a matter of law, at plaintiffs' risk.

Notwithstanding the foregoing, plaintiffs contend that Colorado did not perform its contract and assumed the risk of delay because the strike of the *Hawaiian's* crew allegedly was foreseeable by it at or before the time of shipment. Plaintiffs do not state upon what facts they base this claim of foreseeability. However, as the proof is that neither Becker nor Colorado knew that the strike would occur, plaintiffs' contention must be that Becker, acting on behalf of Colorado, was under the duty to know that the *Hawaiian* was owned by a West Coast line and was under time charter to Isbrandtsen and hence manned by a West Coast crew belonging to West Coast unions and that, with this presumed knowledge and supposedly knowing that the threatened West Coast strike would not be settled, he should have known that the *Hawaiian's* crew would strike the vessel in New Orleans before it could sail from that port. Manifestly, any such proposition is untenable and was properly rejected by the courts below.

Since, as the uncontroverted proof established, Becker did not know and, by custom and practice, was under no duty to ascertain either the ownership of or type of charter covering the *Hawaiian* or the constituency of the vessel's crew, it follows that the courts below correctly refused to charge Becker and Colorado with, or to impute to them, knowledge that the *Hawaiian* was manned by a West Coast crew and with knowledge that such crew members belonged to West Coast unions. By the same token, it also follows that Becker, and through him Colorado, likewise could not be charged with knowledge, or with having

reasonable cause to believe, that the *Hawaiian* would be affected by the threatened West Coast maritime strike.

Plaintiffs' contention that the strike was a foreseeable risk is sheer sophistry. As is apparent, any such contention must rest on the premise that, because Colorado allegedly had notice that the 80-day injunction against the West Coast unions was due to expire on September 2nd, it was not only bound to conclude that a strike would occur immediately thereafter but was also bound to know that such strike would continue not only beyond September 22nd, the date fixed for shipment of part of the caustic soda, but also beyond October 10th, the date fixed for shipment of the remainder. Patently, any such proposition, as the courts below both held, is unsustainable.

First, no one could know whether the labor dispute would end in a strike. Secondly, it was, as it still is, a matter of common knowledge that most threatened strikes either do not materialize at all or are deferred pending further negotiations between the parties to the dispute. Thirdly, no seller could conceivably foretell, before a strike materialized, when it would occur, where it would occur and the duration thereof.

Upon all the facts, it is accordingly clear that when Colorado caused the caustic soda to be put aboard the *Hawaiian* it did so, to use the language of the New York Court of Appeals in *Ledon* v. *Havemeyer*, 121 N. Y. 179, 184, "with the intent, in good faith, to have [it] cleared for the port of destination, or in a reasonable time after the shipment," and that due and proper shipment was then made.

Realizing that the issue involved was correctly decided by the courts below in accordance with applicable New York law, plaintiffs attempt to sidestep this obstacle and to create the illusion of a reviewable conflict under Rule 19, subdivision 1(b), of the Rules of this Court, first, by assuming that Colorado failed to perform its contract and, then, by arguing that under the doctrine of frustration,

as enunciated by this Court and the New York Court of Appeals, the strike may not be proffered by Colorado (which it has not done) as an excuse for its assumed nonperformance (Petition, pp. 12-17). Of course, no such feigned and fictitious issue can, or does, present any question for review by this Court. The issue below was whether Colorado had breached its contract. The courts below both held it had not.

Plaintiffs advert to Judge Hand's comment on Becker's purported action, in permitting Isbrandtsen to substitute the *Hawaiian* for the *Swisshelm*, as amounting to an "irresponsible subinfeudation of authority." However, Judge Hand apparently overlooked the fact, as do plaintiffs, that this was a matter over which Becker had no choice or control, first, because the *Swisshelm* had become unavailable and did not call at the Port of New Orleans (19a) and, secondly, because Isbrandtsen, under its affreightment contract with Colorado, had the unqualified right to substitute any other A-1 vessel, and the *Hawaiian* concededly was such a vessel (51a; Isb. Appx. 58a). Accordingly, if Becker had rejected the *Hawaiian*, as Judge Hand implies he should, he not only would have effected a breach of contract but would have exposed his principal to liability for damages to Isbrandtsen.

In the circumstances of this case any loss occasioned by the strike logically and rightfully should be borne by plaintiffs. They intentionally made the purchase under a c.i.f. contract, declining a prior F.A.S. offer (Pls.' Appx. 5a, 45a), and knew that once the caustic soda was placed aboard a vessel at or before the time specified by them they thereupon would become the owners thereof and that all risk of delay thereafter would be theirs. Since, as the courts below both found, Colorado acted in good faith, this risk could not properly be shifted to it and was justly left where the contract and the New York law placed it.

POINT II

Colorado having been held to have performed its contract and thus having had the absolute right to receive payment against presentation of the bills of lading, no question under the Federal Bill of Lading Act was, or is, presented.

In the Court of Appeals, plaintiffs contended, again on the unfounded assumption that Colorado had not made shipment or performed its contract, that Colorado had no legal right to "negotiate" the bills of lading after the strike and that it committed a fraud in doing so. This argument, as the majority opinion of the Court of Appeals indicates, led to the consideration there given to the Federal Bill of Lading Act (49 U.S.C. § 114(c)).

In view of the Court of Appeals' affirmance of the District Court's determination that Colorado had performed its contract with plaintiffs, which necessarily constituted approval of the District Court's holding that proper shipment of the caustic soda was made prior to the strike, it is clear that no question under the Federal Bill of Lading Act was, or could be, presented. Stated otherwise if, as both courts held, Colorado performed its contract by making proper shipment, payment of the stipulated purchase price to Colorado was obligatory and no right of action under the Bill of Lading Act could possibly arise or exist.

It is elementary that when Colorado made shipment and paid the freight charges, it immediately became entitled to receive Isbrandtsen's two on board bills of lading. In fact, following Colorado's request, through Farrell, for delivery of the bills of lading (Pls.' Appx. 17a), their issuance and receipt was a matter of statutory mandate

and right under Section 3(3) of the United States Carriage of Goods by Sea Act (46 U.S.C. § 1303 (3))*.

The bills of lading received by Colorado evidenced, as was the fact, that shipment had been made, *i. e.*, they were documents which, as was stated in *Victor* v. *National City Bank*, 200 App. Div. 557, 565 (1st Dept.), in quoting with approval from *Diamond Alkali Export Corporation* v. *Fl. Bourgeois*, [1921] 3 K. B. 443, 449, " 'acknowledged actual shipment on board a particular ship'."

This attribute of the bills of lading was not impaired by the subsequent strike. It did not alter the fact that shipment had been made and that the bills of lading correctly evidenced that fact. Accordingly, the majority of the Court of Appeals correctly held that it had not been established "that the worth of the bills of lading was impaired by the strike" (Petition, p. 29).

Under each of the bills of lading, the caustic soda was consigned to the order of The National City Bank or assigns (Isb. Appx. 117a-118a, 125a.) Accordingly, they were both order bills of lading (49 U.S.C. § 83) and, as such, were negotiable or transferable, in the first instance, only by indorsement or delivery by The National City Bank (49 U.S.C. §§ 108, 110). It therefore follows that Colorado, in presenting the bills of lading to The National City Bank, neither could nor did negotiate or transfer the same within the meaning or purview of 49 U.S.C. § 114(c).

In the circumstances presented, it is apparent that the provisions of 49 U.S.C. § 114(c) never came into play, that no question was presented thereunder and that Colorado, as a matter of law, had the absolute right to present the

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* Section 3(3) of the United States Carriage of Goods Act (46 U.S.C. § 1303(3)), in part, provides:

> "After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading * * *."

bills of lading to The National City which was bound to accept the same and honor the accompanying sight drafts presented.

See:

Mee v. *McNider, supra,* 109 N. Y. 500;

Dwane v. *Weil, supra,* 199 App. Div. 719, 730-1 (1st Dept.), affd. 235 N. Y. 527;

Smith Co. Ltd. v. *Moscahlqdes, supra,* 193 App. Div. 126 (1st Dept.);

Warner Bros. & Co. v. *Israel, supra,* 101 F. 2d 59 (C. A. 2d);

In re an Arbitration between Weis & Co., Ltd. and Credit Colonial et Commercial (Antwerp), [1916] 1 K. B. 346.

For the above stated reasons, it also follows that Colorado committed no fraud in presenting the bills of lading and that the Court of Appeals accordingly did not, as plaintiffs assert (Petition, p. 19), either repudiate its dictum in *Ocean S. S. Co.* v. *United States Steel Products Co.,* 239 Fed. 823, 826 (C. A. 2d), cert. den. 244 U. S. 652, or constrict the principles of *Olivier Straw Goods Corporation* v. *Osaka Shosen Kaisha,* 27 F. 2d 129 (C. A. 2d), cert. den. 278 U. S. 618.

CONCLUSION

No question is presented for review by this Court and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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